No 75-1019

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

BOSTON STOCK EXCHANGE, CINCINNATI STOCK EXCHANGE, DETROIT STOCK EXCHANGE, MIDWEST STOCK EXCHANGE, INCORPORATED, PACIFIC COAST STOCK EXCHANGE, PBW STOCK EXCHANGE, INC.,

Plaintiffs-Appellants

v.

STATE TAX COMMISSION, NORMAN GALLMAN, MILTON KOERNER, and A. BRUCE MANLEY, as members of the State Tax Commission of the State of New York,

Defendants-Appellants.

ON APPEAL FROM THE STATE OF NEW YORK
COURT OF APPEALS

JURISDICTIONAL STATEMENT

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OPINIONS BELOW

The opinion of the State of New York Court of Appeals (App. A.) is reported at 37 N.Y.2d 535, 337 N.E.2d 758, 375 N.Y.S.2d 308 (1975). The opinion of the Appellate Division of the Supreme Court of New York, First Department (App. B.) is reported at 45 App.Div.2d 356, 357 N.Y.S.2d 116 (1974). The memorandum decision of the Supreme Court, New York County, Special Term, is unreported, but appears as Appendix E.

JURISDICTION

This suit was brought in the New York State courts to obtain a declaratory judgment that certain provisions of the New York State statute imposing a tax on the sale, transfer, and delivery of securities are unconstitutional and to enjoin enforcement on those provisions. The judgment of the State of New York Court of Appeals was entered on October 21, 1975. (App. A.) The Notice of Appeal was filed on December 9, 1975. (App. G.) The jurisdiction of the Supreme Court is conferred by 28 U.S.C. § 1257(2). *See, e.g., Warren Trading Post Co. v. Arizona State Tax Commission,* 380 U.S. 685 (1965); *American Oil Co. v. Neill,* 380 U.S. 451 (1965); *Western Turf Association v. Greenberg,* 204 U.S. 359 (1907); *cf. Halliburton Oil Well Co. v. Reily,* 373 U.S. 64 (1963); *Nippert v. Richmond,* 327 U.S. 416 (1946).

QUESTION PRESENTED

Does a state tax on the sale, transfer of record ownership, and delivery of securities violate the commerce clause of the United States Constitution, art. 1, § 8, cl. 3, when its avowed legislative purpose and actual effect is to place out-of-state stock exchanges at a competitive disadvantage to in-state stock exchanges by subjecting transfers or deliveries following an out-of-state sale to heavier taxation than those following an in-state sale?

STATUTE INVOLVED

Section 270-a of the New York Tax Law, chapter 827, section 4 of New York Laws of 1968, is set forth in Appendix F.

STATEMENT OF THE CASE

I. Proceedings Below

Plaintiffs-Appellants (hereinafter referred to as "plaintiffs") are six stock exchanges located outside the State

of New York. Defendants-Appellees (hereinafter referred to as "defendants") are the New York State Tax Commission and its members.

Plaintiffs filed suit in the Supreme Court, New York County, Special Term, for declaratory and injunctive relief alleging that section 270-a violates the United States Constitution, section 8 of article 1 (the commerce clause), section 2 of article 4 (the privileges and immunities clause), and section 1 of the fourteenth amendment (the equal protection clause).[1] Defendants' motion to dismiss was denied. Defendants appealed and the Appellate Division of the Supreme Court reversed. The Appellate Division held that plaintiffs had standing to challenge section 270-a but that the statute did not violate the United States Constitution.

On appeal to the State of New York Court of Appeals, plaintiffs argued only on the bases of the commerce clause and the equal protection clause of the fourteenth amendment. The Court of Appeals affirmed dismissal of the complaint, holding that the statute was not unconstitutional.[2] The trial court entered judgment dismissing the complaint pursuant to the order of the Appellate Division, as affirmed by the Court of Appeals. (App. D.)

On appeal in this Court, the plaintiffs rely solely on the commerce clause to establish the unconstitutionality of section 270-a.

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[1] No federal court had jurisdiction to grant the relief requested. 28 U.S.C. § 1341.

[2] The trial court and the Appellate Division held that plaintiffs have standing to bring this suit. This Court's decisions make the correctness of those holdings clear. *See, Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150 (1970). The Court of Appeals did not question plaintiffs standing, and, therefore, that issue is not addressed in this Jurisdictional Statement.

II. The Issue

At issue in this case is the constitutionality of a 1968 amendment to the New York Tax Law. Laws of 1968, ch. 827, § 4. This amendment is now section 270-a of the Tax Law (hereinafter referred to as "section 270-a"). (App. F.)

Since 1905, New York State has imposed a tax (hereinafter referred to as the "transfer tax") on any sale or agreement to sell, or delivery or transfer of equity securities occurring in New York State. With respect to any particular transaction, if more than one of these incidents of taxation occurs within New York State, a tax is imposed on only one such incident.[3]

Prior to the effective date of section 270-a, *viz.*, July 1, 1969, the rate of tax under the transfer tax was based solely on the price of the securities involved. Accordingly, the amount of tax due on any particular transaction varied with the price and number of shares involved but was not affected by which or how many of the incidents of taxation occurred within the state. Section 270-a changed the transfer tax by establishing different tax rates keyed to whether the sale of securities preceding an in-state transfer or delivery occurred in-state or out-of-state.

Plaintiffs maintain trading facilities outside the State of New York for the purchase and sale of securities. Many transfers of record ownership and deliveries of securities following these sales take place within the State of New York. A large portion of the securities which may be purchased and sold on plaintiffs' exchanges also may be purchased and sold on stock exchanges located within the State of New York.

[3] Rules and Regulations under the New York Tax Law, Title 20, § 440.2.

By imposing a discriminatory tax on transfers and deliveries which follow a sale on plaintiffs' exchanges, section 270-a places plaintiffs at a disadvantage in competition with stock exchanges located in New York State. Plaintiffs challenge section 270-a on the ground that this discriminatory tax constitutes an undue burden on interstate commerce in violation of the commerce clause of the United States Constitution.

THE QUESTION PRESENTED IS SUBSTANTIAL

I. Section 270-a Of The New York Tax Law Is Unconstitutional Because Its Purpose And Effect Is To Discriminate Against Interstate Commerce By Putting Out-Of-State Stock Exchanges At A Competitive Disadvantage In Relation to In-State Exchanges.

It has long been established that the commerce clause of the United States Constitution is not only an express delegation of power to Congress, but also a prohibition on state taxing or regulatory enactments that place any undue burden on interstate commerce. *See, e.g., Guy v. Baltimore,* 100 U.S. 743 (1880); *Welton v. Missouri,* 91 U.S. 347 (1876). In one sense this case is unusual among cases arising under the commerce clause in that both the New York legislature and the Governor have baldly asserted that the purpose of the challenged statute is to discriminate against out-of-state businesses, *e.g.,* the plaintiff exchanges, in favor of in-state business, *i.e.,* the New York exchanges. (See pt. A, *infra.*) In *H. P. Hood & Sons v. DuMond,* 336 U.S. 525 (1949), this Court considered a somewhat analogous situation. At issue there was a New York statute which allowed a state administrator to refuse a license to an out-of-state merchant if the issuance of the license would "tend to a destructive competition." 336 U.S. at 528. This Court held that statute violated the commerce clause of the United States Constitution.

A. The Discriminatory Purpose and Effect of Section 270-a.

The Legislative Findings in relation to section 270-a, § 1 of the Laws of 1968, ch. 827, read in part:

> The legislature hereby finds that: . . . In order to encourage the effecting by non-residents of the state of New York of their sales within the state of New York and the retention within the state of New York of sales involving large blocks of stock, a separate classification of the tax on sales by non-residents of the state of New York and a maximum tax for certain large block sales are desirable.

The Governor's Memorandum on Approval of Chapter 827 elaborates somewhat further on the purpose and intended effect of section 270-a, and includes the following:

> Since the stock transfer tax was enacted in 1905, there have been far reaching changes in the securities industry, but the stock transfer tax has not been revised to keep pace with those changes. The securities industry has grown from an essentially New York industry to one of national and international scope. *While the bulk of stock transfer still funnels through New York,* only twelve percent of the Nation's investors are located in the State. At the same time, competition for the New York markets has been heightened by the rise of regional stock exchanges located outside the State where more than 90 percent of trading is in securities listed on the New York Stock Exchange. *The development of modern telecommunications and electronic computer systems has, of course, greatly expanded the capacity of the regional exchanges to challenge the New York exchanges for business.*
>
> The bill recognizes the changing character of the securities industry and the importance of its continued presence and strength for the future economic prosperity of the State and *will provide long-term relief from some of the competitive pressures from outside the State.*[4]

[4] 1968 Public Papers of Governor Rockefeller, pp. 552-54; 1968 McKinney's Session Laws of New York, Vol. 2, p. 2384. (Emphasis added.)

The avowed purpose of section 270-a is thus to divert transactions away from the plaintiff exchanges and to the stock exchanges located within New York State. As the opinion of the Appellate Division below stated:

> **[I]ndeed a purpose of the 1969 amendment [section 270-a] was to discourage diversion of stock transactions from New York exchanges and to encourage transaction of securities in New York. 45 App.Div.2d 365, 357 N.Y.S.2d 116, 118-119.**

The discrimination against out-of-state exchanges announced as the purpose of section 270-a is accomplished in the statute by granting two major types of tax advantages to taxable transactions (*i.e.*, sales, transfers or deliveries in New York) if, and only if, the particular taxable transaction involves an in-state sale as opposed to an out-of-state sale.[5] The first of these is a "maximum tax" of $350 in the case of a taxable transaction involving a sale made within New York State but not in the case of a taxable transaction involving an out-of-state sale. The second type of tax advantage is a 50% discount in the amount of tax due on taxable transactions of non-residents if they sell in New York State rather than outside of it.

The following examples illustrate the operation of the two discriminatory aspects of section 270-a:

Operation of "Maximum Tax"

X, a large investor, *e.g.*, a pension fund, wishes to sell 100,000 shares of ABC Company common stock.[6] (The residence of the investor is irrelevant.) If X sells on the New York Stock Exchange and transfers record owner-

[5] A federal statute has recently become effective which limits the application of New York's transfer tax in certain situations, but which does not affect either the constitutional issue raised in this case or this Court's jurisdiction. Securities Acts Amendments of 1975, § 21(2), Pub.L.No. 94-29, § 21(2) (June 4, 1975). See Appendix G.

[6] For purposes of these examples and the subsequent graphs, it is assumed that the stock of ABC Company sells for more than $20 per share. Stock selling for less than $20 per share is subject to a lower rate of tax, but the discriminatory treatment of out-of-state

ship or effects delivery in New York, it pays only the "maximum" tax provided by Section 270-a—*i.e.*, $350. If, instead, it sells on one of the plaintiffs' exchanges and transfers record ownership or effects delivery in New York, it must pay the "regular" rate of $.05 per share without any "maximum", or a total of $5,000.

Operation of "Non-Resident Discount"

Y, a non-New York resident, wishes to sell 100 shares of ABC Company common stock.[7] If Y sells on one of the plaintiffs' exchanges and transfers record ownership or effects delivery in New York, he pays the "regular" rate of $.05 per share for a total tax of $5.00. If, on the other hand, Y sells on the New York Stock Exchange and transfers record ownership or effects delivery in New York, he pays a tax calculated at a rate of exactly half as much, *i.e.*, $.025 per share, for a total tax of $2.50. In the latter case, Y pays half as much tax not because he is a non-resident, but because he made the sale within New York State rather than outside it.

The graphs on the next pages illustrate both the absolute impact of the unequal treatment created by the "maximum tax" and the relative significance of the discrimination inherent in the "non-resident discount". In the graphs (which are on different scales reflecting different ranges of impact of the two separate discriminatory provisions), taxable transactions involving an in-state sale are represented by the solid lines; taxable transactions involving an out-of-state sale are represented by the broken lines. The shaded areas represent the difference in the amount of tax that must be paid on the same taxable transaction depending upon whether the sale is accomplished in New York or outside of New York.

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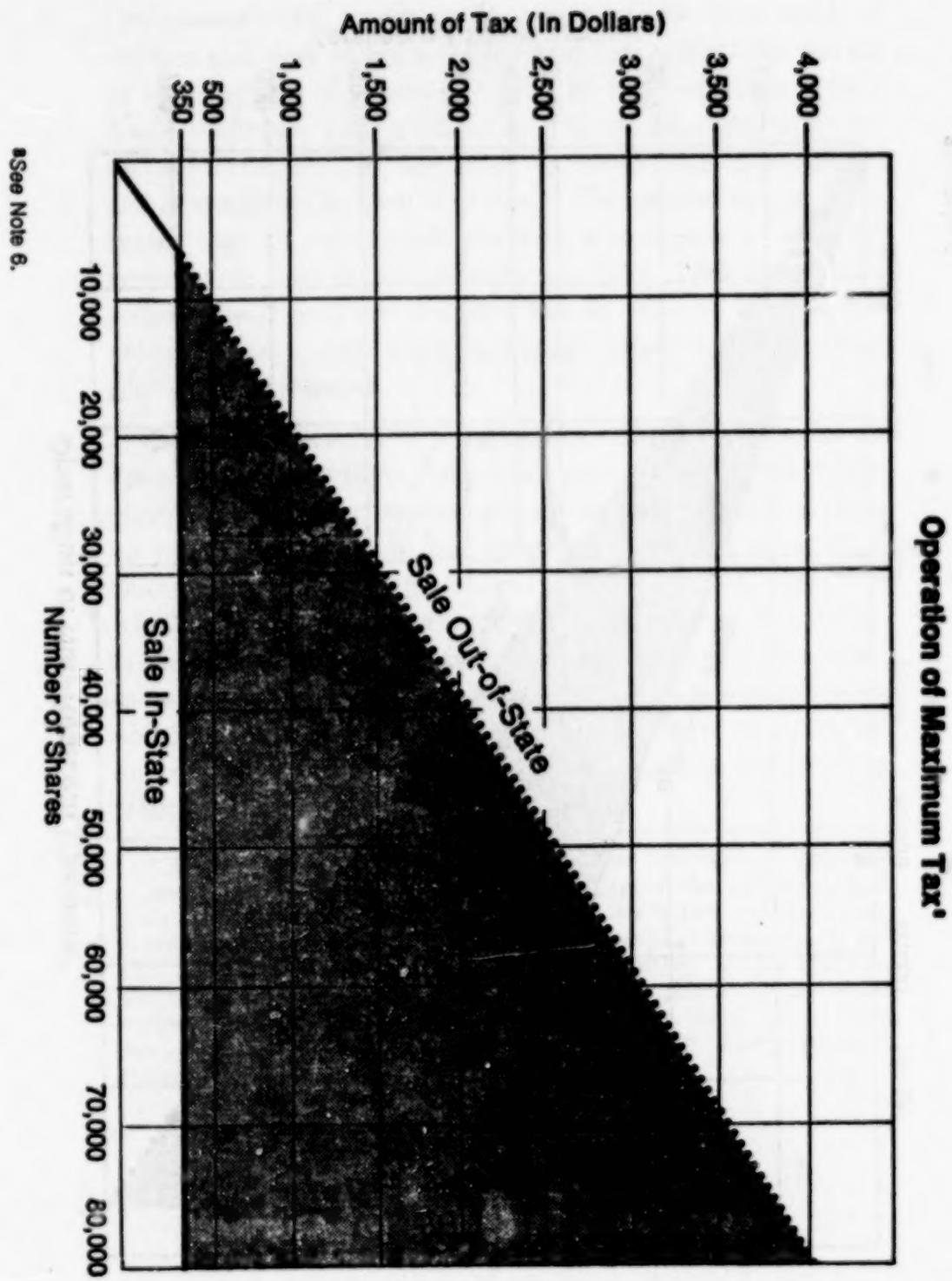
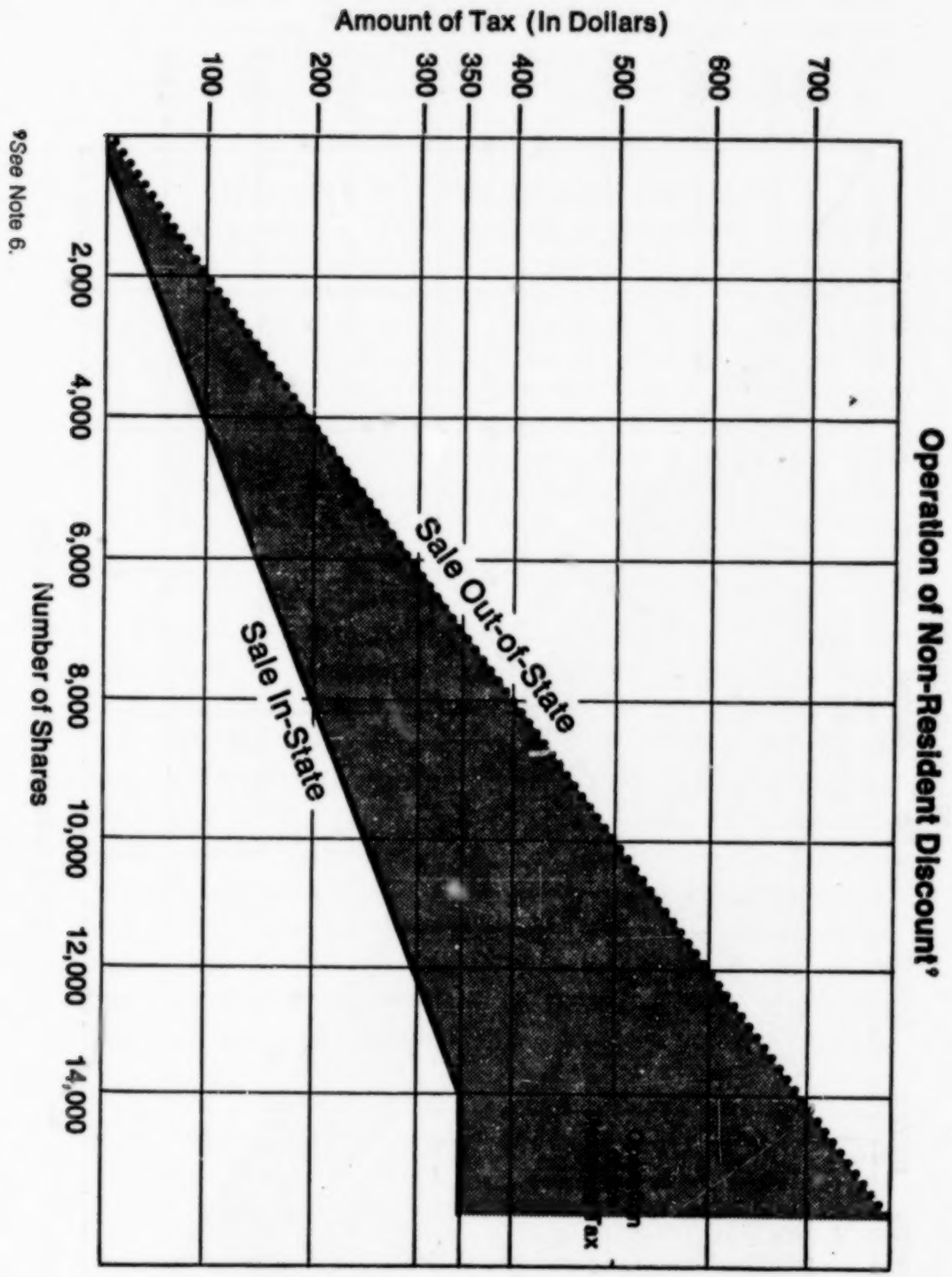
[6] (Continued)
sales illustrated by the two examples is not affected by the lower basic rate. In addition, no provision is made in the examples or the graphs for the 25% "tax surcharge" on all taxes computed under § 270 and § 270-a which became effective July 8, 1975. New York Tax Law, Art. 12, § 270-d.

[7] *See* note 6 *supra*.





[9] See Note 6.

The first graph demonstrates that the benefit of the "maximum" tax provision is measured in thousands of dollars and thus offers a substantial inducement for sellers of large blocks of securities to effect their sales on a New York exchange rather than on one of the plaintiffs' exchanges even though the price at which they are able to sell is equal in the two locations.[10] The second graph illustrates that an out-of-state resident who wishes to or must transfer or deliver his securities in New York State may reduce the New York transfer tax by 50% if he sells his securities on a New York exchange rather than on one of plaintiffs' exchanges.

Clearly, section 270-a is designed to divert business away from plaintiffs to their competitor exchanges located within New York State by imposing materially different tax rates on persons engaged in one type of activity in New York State, *i.e.*, transferring or delivering securities, based on whether they have also engaged in another type of activity in New York State, *i.e.*, selling those securities. The commerce clause of the United States Constitution forbids such an obvious and continuing effort of one state to establish an economic barrier via its tax laws against competition from services offered in other states.

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[10] An increasing percentage of all securities trading is in "blocks" of securities large enough to take advantage of the maximum tax. Institutional Investor Study Report of the Securities and Exchange Commission, H.R. Doc. No. 92-64, 92d Cong., 1st Sess., pt. 4, ch. XI (1971). Sales of securities in blocks of 10,000 shares or more comprised approximately 17% of the trading volume in securities traded on the New York Stock Exchange in 1975. New York Stock Exchange Research Department Newsletter, "Large Blocks", January 2, 1976.

B. The Unconstitutionality of Section 270-a.

However unique section 270-a may be in the candid statement of its intent, the discriminatory operation of the statute is in the classic mold of state taxing schemes designed to protect parochial state economic interests against out-of-state competition. This Court has consistently held that such statutes violate the commerce clause. *See, e.g., Halliburton Oil Well Co. v. Reily,* 373 U.S. 64 (1963); *Memphis Steam Laundry Cleaner, Inc. v. Stone,* 342 U.S. 389 (1952); *Nippert v. Richmond,* 327 U.S. 416 (1946); *Best & Co. v. Maxwell,* 311 U.S. 454 (1940); *Robbins v. Taxing District,* 120 U.S. 489 (1887); *Guy v. Baltimore,* 100 U.S. 743 (1880); *Welton v. Missouri,* 91 U.S. 347 (1876). *See also, Robert Emmet & Son Oil & Supply Co. v. Sullivan,* 158 Conn. 234, 259 A.2d 636 (1969); *cf. Pike v. Bruce Church, Inc.,* 397 U.S. 137 (1970); *Polar Ice Cream & Creamery Co. v. Andrews,* 375 U.S. 361 (1964); *Dean Milk Co. v. Madison,* 340 U.S. 349 (1951); *Baldwin v. G.A.F. Seelig, Inc.,* 294 U.S. 511 (1935); *Foster-Fountain Packing Co. v. Haydel,* 278 U.S. 1 (1928); *Johnson v. Haydel,* 278 U.S. 16 (1928).

The facts of *Halliburton, supra,* present an instructive analogy to this case. The issue before the Court in *Halliburton* was whether a Louisiana sales and use tax scheme violated the commerce clause by reason of imposing a greater tax burden on persons using equipment in Louisiana that they had manufactured outside of Louisiana than on persons using equipment in Louisiana that they had manufactured in Louisiana. As in the present case, the statute challenged imposed different tax burdens on one type of activity (there, the use; here, the transfer or delivery) depending on whether another, related type of activity had been done in-state (there, the manufacture;

here, the sale).[11] In concluding that the Louisiana tax was prohibited by the commerce clause, this Court stated:

> If Louisiana were the only state to impose an additional tax burden for such out-of-state operations, the disparate treatment would be an incentive to locate within Louisiana; it would tend "to neutralize advantages belonging to the place of origin." *Baldwin v. G.A.F. Seelig, Inc.,* 294 U.S. 511, 527 . . . . Disapproval of such a result is implicit in all cases dealing with tax discrimination, since a tax which is "discriminatory in favor of the local merchant," *Nippert v. Richmond,* 327 U.S. 416 . . . also encourages an out-of-state operator to become a resident in order to compete on equal terms. If similar unequal tax structures were adopted in other States, a not unlikely result of affirming here, the effects would be more widespread . . . . Clearly, approval of the Louisiana use tax in this case would "invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause." *Dean Milk Co. v. Madison,* 340 U.S. 349, 356 . . . . 373 U.S. at 72, 73 (footnotes omitted).

The parallel between this case and *Welton v. Missouri, supra,* decided exactly 100 years ago, is also striking. In *Welton,* this Court held unconstitutional a Missouri statute that required peddlers who sold merchandise which *was not* "the growth, produce, or manufacture of the State" to obtain a license. No license was required of peddlers who sold merchandise which *was* "the growth, produce, or manufacture of the State". In the present case, the New York transfer tax imposes a higher tax burden on transfers of record ownership or deliveries if the transfer or de-

[11] The Court of Appeals opinion brushes aside the precedential impact of *Halliburton* on this case by saying that the issue of whether a sale in-state by a nonresident loses "its interstate character" was "neither argued nor decided" in *Halliburton.* 337 N.E.2d at 763, 375 N.Y.S.2d at 315. This issue is, in fact, irrelevant to this this case; *see* pt. II.A. *infra.*

livery is the result of a sale made in another state rather than a sale "made within this state".[12] The words of this Court in *Welton* should control the result in this case:

> [T]he commercial power [of the Federal Government over a commodity] continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character. That power protects it, even after it has entered the State, from any burdens imposed by reason of its foreign origin. 91 U.S. at 350.

II. The State Of New York Court Of Appeals Erred In Its Judgment Regarding The Validity Of Section 270-a Under The Commerce Clause Of The United States Constitution.

A. The Court of Appeals Incorrectly Viewed the Statute as Merely Discriminating Between Two Types of "Interstate Commerce" Rather Than Between Out-of-State Businesses and In-State Businesses.

In what can only be called a novel approach to the commerce clause, the Court of Appeals characterized taxable transactions involving an in-state sale and taxable transactions involving an out-of-state sale as both being "interstate commerce" if the seller in both situations is a non-resident. It then proceeded to conclude that because no "intrastate commerce" was involved, the competitive disadvantage at which section 270-a placed plaintiffs in relation to in-state exchanges was merely the result of discrimination between various types of "interstate" transactions and thus not prohibited by the commerce clause.[13] In so holding, the

[12] New York Tax Law, Art. 12, § 270-a (1) and (2).

[13] 337 N.E.2d at 762-63; 375 N.Y.S.2d at 314-15. The only authority cited for this theory, *Freeman v. Hewit*, 329 U.S. 249 (1946), is a case which deals only with the jurisdiction of a state to tax an "interstate sale" (holding that such sales could *not* be taxed). That issue is not presented here because plaintiffs have never contested that New York has the authority to tax the transfer, delivery and sale of securities which occur in-state.

court chose to ignore the ". . . doctrine . . . that the practical operation of the tax, actual or potential, rather than its descriptive label or formal character is determinative." *Nippert v. Richmond*, 327 U.S. at 424, n. 9.

The central fact in the present case, which the court below refused to confront, is that section 270-a in its stated purpose and practical operation is "discriminatory in favor of the local merchant as against the out-of-state one". *Nippert v. Richmond*, 327 U.S. at 431. *That* is the discrimination against interstate commerce that plaintiffs challenge in this case. The New York tax is imposed on all transfers and deliveries of securities within New York but different rates are applied depending upon whether the preceding sale of the securities occurred in-state or out-of-state. Out-of-state sales lead to a higher tax than in-state sales, thus discriminating against plaintiffs' exchanges in favor of New York exchanges. The stated intent of this discrimination is to "provide long-term relief [for the New York exchanges] from some of the competitive pressures from outside the State." (Governor's Memorandum, *supra* note 4.)

Although the Court of Appeals refused to recognize that this discrimination was even governed by the commerce clause, this Court has made clear that a fundamental purpose of the commerce clause is to prohibit a state from using its taxing authority to ". . . build up its domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States." *Guy v. Baltimore*, 100 U.S. 743, 746 (1880).

B. The Court of Appeals Erred in Upholding the "Maximum Tax" as Applied to Sales of Securities by New York Residents by Assuming That Its Inherent Discrimination "Should Have Little Or No 'Practical' Effect".

Under section 270-a if an institutional investor that is a New York resident sells a block of securities in-state, it

pays the $350 "maximum tax", but if it sells that same block on one of plaintiff exchanges and transfers or receives delivery in New York, it must pay the unlimited percentage rate. The Court of Appeals was forced to deal separately with this situation because even in its incorrect approach to the commerce clause (*see* pp. 14-15 *supra*) when an out-of-state transaction by a resident is taxed more heavily than an in-state transaction by a resident, there has been a discrimination against interstate commerce. Rather than holding this discrimination a violation of the commerce clause, however, the Court of Appeals dismissed the issue with the statement that because a New York resident "is more than likely" to sell securities on a New York exchange, section 270-a ". . . should have little or no 'practical' effect on such transactions." 337 N.E.2d at 762, 375 N.Y.S.2d at 314.

This assumption is incorrect, without support in the record, and contrary to the legislative history of section 270-a. Large institutional investors doing a national and international business (those most likely to execute the large block transactions affected by the maximum tax) are unlikely to transact their business on a local exchange merely because of geographic proximity. Their choice of a stock exchange—assuming no tax discrimination—will be based on the best available services and prices. At the very least, this is a factual question which should not have been resolved against plaintiffs on a motion to dismiss. *Cf., Ingraham v. Maurer,* 39 App.Div.2d 258, 334 N.Y.S.2d 19 (1972); *Levien v. Board of Zoning and Appeals,* 313 N.Y.S. 2d 909 (Sup. Ct. 1970).

Moreover, as long as the discriminatory tax exists making it more expensive for New York residents to do business out-of-state than in-state, access to alternative securities markets by those New York residents who are dissatisfied

with the services and prices offered by New York exchanges will be inhibited.[14] The assurance of such access rather than speculation about the "practical effect" of discriminatory tax schemes is at the heart of the commerce clause. As this Court stated in *H. P. Hood & Sons v. DuMond,* 336 U.S. 525 (1948):

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by customs duties or regulations exclude them. Likewise, *every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any.* Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality. 336 U.S. at 539. (Emphasis added.)

C. The Court of Appeals Erred in Justifying Section 270-a As "Compensatory Legislation" And In Analogizing It To A Valid Use Tax.

The Court of Appeals attempted to justify section 270-a on the ground that it is "compensatory legislation" designed to "neutralize" the "economic advantage" enjoyed by out-of-state exchanges because the sales on those exchanges are not taxed. 337 N.E.2d at 762, 375 N.Y.S. 2d at 314. This is not, however, a justification for section 270-a but the basis of its unconstitutionality. For as this Court has made clear, such an ". . . attempt to neutralize economic advantages belonging to the place of origin" is

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[14] Congress has recognized that "[i]t is in the public interest and appropriate for the protection of investors . . . to assure . . . fair competition . . . among exchange markets. . . ." Securities Exchange Act of 1934, § 11A(a)(1)(C)(ii), 15 U.S.C. § 78q-1(a)(1)(C)(ii).

prohibited by the commerce clause of the Constitution. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 528 (1935).

In *Baldwin*, this Court was presented with an attempt to justify another New York statute on essentially the same grounds as those used by the Court of Appeals in this case. The plaintiff in *Baldwin* purchased milk from producers in Vermont and attempted to resell it to customers in New York State. Because New York set minimum prices to be paid in-state producers, plaintiff could buy milk from Vermont producers at lower prices than his competitors could buy from New York producers. In an effort to "neutralize" this "economic advantage" of Vermont producers, New York prohibited the sale of milk to customers in New York State if the milk had been purchased from out-of-state producers for less than the minimum price set by the state.

In rejecting New York's rationale for this prohibition, Justice Cardozo, for this Court, stated:

> Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin. They are thus hostile in conception as well as burdensome in result. . . . The importer must be free from imposts framed for the very purpose of suppressing competition from without and leading inescapably to the suppression so intended. 294 U.S. at 527.

As New York could not protect its farmers by "neutralizing" the advantage Vermont's farmers enjoyed by not being subject to New York's fixed minimum prices, it cannot protect its stock exchanges by "neutralizing" the advantage out-of-state exchanges enjoy by not having their sales subject to New York's tax. Without the discriminatory tax it may be to a seller's economic advantage to sell his securities on an exchange located outside of New York State rather than on one located in the state. But if he must or wishes to transfer or deliver those securities in New York ("import" the securities into the state in the *Baldwin* context), he not only loses the economic advantage of selling on an out-of-state exchange but also is put at an economic disadvantage in comparison to a seller on an in-state exchange. Thus under section 270-a, a seller of securities on one of plaintiffs' exchanges is in effect subjected to an "impost" or "customs duty" which New York has ". . . framed for the very purpose of suppressing competition from without [the state]." 294 U.S. at 527. Therefore, rather than providing a justification for section 270-a, the fact that the statute represents an effort to "neutralize" the economic advantages enjoyed by out-of-state exchanges renders it invalid under the commerce clause.

The Court of Appeals suggests, nevertheless, that section 270-a is analogous to a "use tax" and can be justified on that basis. 337 N.E.2d at 762, 375 N.Y.S.2d at 314. In this reasoning, however, the court below was in error because section 270-a does not result in equal tax burdens for in-state and out-of-state sellers, which is the "strict rule" applied by this Court to determine the validity of compensatory use taxes. *See Halliburton Oil Well Co. v. Reily*, 373 U.S. 64, 70 (1963); *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937).

Halliburton Oil Well Co. v. Reily, supra, is directly on point with respect to the validity of section 270-a as a compensating tax. In *Halliburton* a greater tax was imposed on persons using equipment in Louisiana that they had

manufactured out-of-state than on persons using equipment in Louisiana that they had manufactured in-state. In the instant case, a greater tax is imposed on persons transferring or delivering securities in New York that they have sold out-of-state than on persons transferring or delivering securities in New York that they have sold in-state. In evaluating the tax in *Halliburton,* this Court stated:

> The conclusion is inescapable: equal treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state. 373 U.S. at 70.

The tax in *Halliburton* was struck down for violating this "strict rule of equality." 272 U.S. at 73. Section 270-a is invalid for the same reason.

The only relevant authority cited by the Court of Appeals in support of its view is *Alaska v. Artic Maid,* 366 U.S. 199 (1961).[15] In that case, Alaska imposed an "occupation" tax on "freezer ships" obtaining fish in Alaska's territorial waters and transporting them to out-of-state canneries. Alaska canners were the competitors of these "freezer ships". This Court held the tax valid because it did not involve any ". . . discrimination in favor of the former and against the latter. For no matter how the tax on 'freezer ships' is computed, it did not exceed the . . . tax on the local canners." 366 U.S. at 204. In the instant case, however, the New York tax on a transfer or delivery following an out-of-state sale *does exceed* the tax imposed on comparable transactions involving an in-state sale. Thus rather than supporting section 270-a, *Artic Maid* points to

[15] The Court of Appeals also cited *Miller Brothers Co. v. Maryland,* 347 U.S. 340 (1954). The issue in that case, however, was not the validity of a compensating use tax, but rather the right of a state imposing a use tax to force an out-of-state merchant to collect the tax from a vendee who was a resident of the taxing state.

its invalidity under the commerce clause because of the discrimination in favor of in-state exchanges and against out-of-state exchanges.

CONCLUSION

The question presented by this appeal is substantial because of the significant burden on interstate commerce imposed by the discriminatory aspects of the New York transfer tax and the conflict of the State of New York Court of Appeal's decision with the decisions of this Court. As this Court said in *Baldwin v. G.A.F. Seelig, Inc.,* 294 U.S. at 522:

> If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation.

As New York could not protect its farmers in a manner that violated the commerce clause, it cannot protect its stock exchanges. For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,
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Appendix A

Opinion and Decision of the State of New York Court of Appeals

BOSTON STOCK EXCHANGE, et. al.
Appellants

v.

STATE TAX COMMISSION, et. al.
Respondents

October 21, 1975

Roger Pascal, Chicago, Ill., of the Illinois Bar, admitted pro hac vice, Milton H. Cohen and Allan Horwich, Chicago, Ill., for appellants.

Louis J. Lefkowitz, Atty. Gen. (Robert W. Bush and Ruth Kessler Toch, Albany, of counsel), for respondents.

Adrian P. Burke, Corp. Counsel, New York City (Samuel J. Warms and Robert J. Metzler, II, New York City, of counsel), for the City of New York, amicus curiae.

WACHTLER, Judge.

Since the turn of the century this State has levied a stock transfer tax (Tax Law, § 270). Recently the law was amended to reduce the tax on sales by nonresidents and to fix a maximum tax on all bulk sales within the State (Tax Law, § 270-a). The appellants, all of whom are stock exchanges located outside New York, seek a judgment declaring section 270-a unconstitutional on the grounds that it denies them equal protection of the laws, and discriminates against interstate commerce in violation of the commerce clause (U.S.Const. art. I, § 8).[1]

[1] In the lower courts appellants also argued that the statute violated the privileges and immunities clause (U.S. Const. art. IV, § 2), but that contention has been abandoned on this appeal.

At Special Term the defendant tax commission unsuccessfully argued that the State courts lacked subject matter jurisdiction, that the appellants lacked standing and that the complaint failed to state a cause of action. The Appellate Division modified, agreeing that the courts had subject matter jurisdiction and that the appellants had the requisite standing to raise the issues but found that the statute did not violate the Constitution as alleged. Accordingly they dismissed the complaint on the merits (45 A.D.2d 365, 357 N.Y.S.2d 116). The order of the Appellate Division should be affirmed.

Section 270 of the Tax Law imposes a tax "on all sales, or agreements to sell, or memoranda of sales and all deliveries or transfers of shares or certificates of stock". The tax depends on the value of the stock, the maximum tax being 5 cents per share. When the sale is made within the State, the tax may be levied on any of these events, but no more than one of them (20 NYCRR 440.2). When the sale and all the accompanying negotiations occur outside the State—as on one of the appellants' exchanges—no tax is due unless the stock is transferred in New York by a local transfer agent or upon the corporate books (see, e. g., *Matter of Monarch Life Ins. Co. v. State Tax Comm.*, 32 N.Y.2d 850, 346 N.Y.S.2d 272, 299 N.E.2d 684).

The constitutionality of this statute, originally enacted in 1905, has been sustained on several occasions against claims that it violated due process, equal protection (*Hatch v. Reardon*, 204 U.S. 152, 27 S.Ct. 188, 51 L.Ed. 415) and the commerce clause (*O'Kane v. State of New York*, 283 N.Y. 439, 28 N.E.2d 905; cf. *Hatch v. Reardon, supra*). It is now well settled that the commerce clause does not prohibit the States from levying a tax on the transfer of property within the State (*International Harvester Co. v. Department of Treasury*, 322 U.S. 340, 348, 64 S.Ct. 1019, 88 L.Ed.

1313; cf. *Freeman v. Hewit*, 329 U.S. 249, 258, 67 S.Ct. 274, 91 L.Ed. 265). Thus far the parties are agreed—the basic tax is constitutionally valid.

In 1966 complaints reached the Legislature that the transfer tax was driving business from the State. Specifically the New York exchanges complained that although brokers in other States charged the same commissions, transactions on the New York exchanges were placed at a disadvantage because none of the States in which the competing exchanges were located imposed a tax on stock sales or transfers. After extensive investigation the Legislature found that "the tax on transfers • • • is an important contributing element to the diversion of sales to other areas to the detriment of the economy of the state. Furthermore, in the case of transactions involving large blocks of stock, recognition must be given to the ease of completion of such sales outside the state of New York without the payment of any tax. In order to encourage the effecting by nonresidents of the state of New York of their sales within the state of New York and the retention within the state of New York of sales involving large blocks, a separate classification of the tax on sales by nonresidents of the state of New York and a maximum tax for certain large block sales are desirable" (L.1968, ch. 827). Accordingly the Legislature amended the tax law, adding section 270-a, which reduces the tax by 50% when a nonresident sells stock within the State. And when any shareholder, resident or nonresident, sells a large block of stock within the State, the tax due is limited to a maximum of $350.[2]

[2] These are the rates which are presently applicable. When section 270-a originally went into effect on July 1, 1969, it provided for higher rates—95% for nonresidents, and a maximum tax of $2,500. This was gradually reduced to the current rates which became effective July 1, 1973.

If section 270-a is invalidated, the prior tax scheme would again become effective (L.1968, ch. 827, § 11) and the appellants would be restored to their position of economic superiority.

First we consider the appellants' argument that the statute violates the equal protection clause "because it establishes an arbitrary classification dependent upon the place of sale." The equal protection clause is often invoked in support of a claim that a State taxing scheme is arbitrary. This is a familiar argument and the general principles are well settled.

It has been repeatedly held that "in taxation, even more than in other fields, legislatures possess the greatest freedom in classification" (*Madden v. Kentucky,* 309 U.S. 83, 88, 60 S.Ct. 406, 408, 84 L.Ed. 590) and that the equal protection "clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation" (*Allied Stores of Ohio v. Bowers,* 358 U.S. 522, 526, 527, 79 S.Ct. 437, 440, 3 L.Ed.2d 480). To succeed on the equal protection argument, the appellants must not only overcome the presumption of constitutionality which attaches to every statute (*Madden v. Kentucky,* 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 590, *supra*) but must also establish that there is no "conceivable state of facts which would support" the classification (*Carmichael v. Southern Coal Co.,* 301 U.S. 495 509, 57 S.Ct. 868, 872, 81 L.Ed. 1245; *Lawrence v. State Tax Comm.,* 286 U.S. 276, 52 S.Ct. 556, 76 L.Ed. 1102; *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 93 S.Ct. 1001, 35 L.Ed.2d 351). The burden is on the one challenging the statute "to negative every conceivable basis which might support it" (*Madden v. Kentucky, supra,* 309 U.S. at p. 88, 60 S.Ct. at p. 408).

Initially we note, as did the Appellate Division, that the place of sale is not always the determining factor under the statute in question. If a small sale is involved the full tax must be paid unless the seller is a nonresident. Thus the statute also distinguishes between residents and nonresidents in favor of the latter. The avowed purpose, as the legislative history indicates, was to encourage nonresidents to sell on the New York exchanges. Similar legislation has been consistently upheld "and [it] appears to be entirely settled that a statute which encourages the location within the State of needed and useful industries by exempting them, though not also others, from its taxes is not arbitrary and does not violate the Equal Protection Clause of the Fourteenth Amendment" (*Allied Stores of Ohio v. Bowers,* 358 U.S. 522, 528, 79 S.Ct. 437, 441, 3 L. Ed.2d 480).

The Appellate Division also found that the distinction between in-State and out-of-State sales could be justified on the ground that "[t]ransactions made in New York are less susceptible to tax evasion than those made outside" (45 A.D.2d p. 369, 357 N.Y.S.2d p. 120). They found that *Madden v. Kentucky (supra)* supported this conclusion and we agree. In that case the State imposed an *ad valorem* tax of 10 cents per $100 on deposits in local banks, but taxed deposits in out-of-State banks at 50 cents per $100. Although the amount of tax was based on an out-of-State event, the court found that the classification was not arbitrary within the meaning of the equal protection clause since "The treatment accorded the two kinds of deposits may have resulted from the differences in the difficulties and expenses of tax collection" (*Madden,* 309 U.S. 83, 90, 60 S.Ct. 406, 409, 84 L.Ed. 590, *supra*).

Here, of course, the Legislature noted that tax evasion was one of the factors which prompted the enactment of section 270-a. But even if their motives had been more subtly stated, or completely unstated, the fact remains that this is a conceivable basis for the distinction. The Legislature, of course, is not required to "record a complete catalogue of the considerations which move its members to enact laws" (*Carmichael,* 301 U.S. 495, 510, 57 S.Ct. 868, 872, 81 L.Ed. 1245, *supra*; see, also, *Lehnhausen,* 410 U.S. 356, 93 S.Ct. 1001, 35 L.Ed.2d 351, *supra*).

Finally the appellants argue that the distinction between sales made within the State and sales completed elsewhere discriminates against interstate commerce. The commerce clause, of course, imposes additional limitations on the States' taxing powers and "restrictions inimical to the commerce clause should not be approved simply because they facilitate in some measure enforcement of a valid tax" (*Toomer v. Witsell,* 334 U.S. 385, 406, 68 S.Ct. 1156, 1167, 92 L.Ed. 1460). The question in other words is no longer whether the distinction can be justified by "any conceivable state of facts which could support it" (*Carmichael, supra,* 301 U.S. at p. 509, 57 S.Ct. at p. 872). "The guiding principle which limits the power of the States to tax is that the several States of the Union may not discriminate against interstate commerce in favor of intrastate commerce." (*O'Kane v. State of New York,* 283 N.Y. 439, 446, 28 N.E.2d 905, 908, *supra*; see, also, *Robbins v. Shelby County Taxing Dist.,* 120 U.S. 489, 7 S.Ct. 592, 30 L.Ed. 694; *Welton v. Missouri,* 91 U.S. 275, 23 L.Ed. 347; *Memphis Steam Laundry v. Stone,* 342 U.S. 389, 72 S.Ct. 424, 96 L.Ed. 436; *Nippert v. Richmond,* 327 U.S. 416, 66 S.Ct. 586, 90 L.Ed. 760; *Best & Co. v. Maxwell,* 311 U.S. 454, 61 S.Ct. 334, 85

L.Ed. 275; *Halliburton Oil Well Co. v. Reily,* 373 U.S. 64, 83 S.Ct. 1201, 10 L.Ed.2d 202.)

Here, as indicated, the Legislature found that the tax as originally enacted had the reverse effect in that it conferred an economic advantage on exchanges located outside the State. The appellants do not dispute this. To neutralize this advantage, the Legislature enacted section 270-a and it seems clear that they had the power to do so. A use tax is a familiar example of this type of compensatory legislation and it is well settled that it does not offend the commerce clause (see, e. g., *Miller Bros. Co. v. Maryland,* 347 U.S. 340, 343, 74 S.Ct. 535, 98 L.Ed. 744; cf. *Alaska v. Arctic Maid,* 366 U.S. 199, 81 S.Ct. 929, 6 L.Ed.2d 227). Thus the stated legislative goal is a valid one.

Although helpful, this is not necessarily controlling for the determinative question in each case is "whether the statute under attack • • • will in its practical operation work discrimination against interstate commerce" (*Best & Co. v. Maxwell,* 311 U.S. 454, 456, 61 S.Ct. 334, 335, 85 L.Ed. 275, *supra*).

The statute should have no practical effect whatsoever on sales by shareholders, both residents and nonresidents, involving stocks which do not have to be transferred in New York. If they sell on a New York exchange, of course they can claim the benefit of section 270-a. But if they sell on one of the appellants' exchanges, they would pay no tax at all. Here the stock transfer law still works to the appellants' economic advantage.

The sale of New York securities poses a different problem. Then the transfer tax must be paid and the amount due depends on whether the sale is made in New York or elsewhere. In the case of New York residents it is more

than likely (cf. *Nippert v. Richmond,* 327 U.S. 416, 66 S.Ct. 586, 90 L.Ed. 760) that the sale would be made on a New York exchange in any event, so that section 270-a should have little or no "practical" effect on such transactions.

The appellants' major argument then is that section 270-a discriminates against interstate commerce by encouraging nonresidents to sell New York securities on New York exchanges. This assumes that such sales would be intrastate so that the practical effect of the statute would be to "discriminate against interstate commerce in favor of intrastate commerce" (*O'Kane,* 283 N.Y. 439, 446, 28 N.E.2d 905, 908, *supra*).

The sale of intangibles is, of course, commerce within the meaning of the commerce clause (*Freeman v. Hewit,* 329 U.S. 249, 67 S.Ct. 274, 91 L.Ed. 265). And we can assume that sales of New York stocks by a nonresident on an out-of-State exchange would nevertheless involve interstate commerce because the securities must ultimately be transferred in New York (but see *Hatch v. Reardon,* 204 U.S. 152, 27 S.Ct. 188, 51 L.Ed. 415, *supra*). But we cannot assume, as the appellants do, that if the nonresident chooses to make the sale in New York—in order to claim the exemption provided by the statute—the transaction would lose its interstate character.

Typical of this latter type of transaction is one in which a resident of one of the areas in which the appellants operate gives his New York broker, or a New York correspondent of a local broker, an order to sell. When, in such a case, the New York broker executes the order, the customer will normally send his stock certificate to the New York broker to fulfill his agreement to sell. Such a sale is not an intrastate transaction. On the contrary in

Freeman v. Hewit, 329 U.S. 249, 259, 67 S.Ct. 274, 280, 91 L. Ed. 265, *supra* the Supreme Court considered an identical transaction and concluded "Of course this is an interstate sale". In other words the trouble with the appellants' argument is that a sale by a nonresident on a New York exchange—the type of transaction the law allegedly encourages—is still interstate commerce. Nor are we persuaded by appellants' argument that the decision in *Halliburton Oil Well Co. v. Reily,* 373 U.S. 64, 83 S.Ct. 1201, 10 L.Ed.2d 202, *supra* compels a different result since in that case this precise point was neither argued nor decided.

The order of the Appellate Division should be affirmed.

BREITEL, C. J., and JASEN, GABRIELLI, JONES, FUCHSBERG and COOKE, JJ., concur.

Order affirmed, with costs.

JULY 9, 1974

Memorandum Decision of the Appellate Division.

SUPREME COURT: APPELLATE DIVISION

First Department, May 1974

Emilio Nunez, J.P.
Theodore R. Kupferman,
Aron Steuer,
Louis J. Capozzoli,
Daniel E. Macken, JJ.

BOSTON STOCK EXCHANGE, CINCINNATI STOCK EXCHANGE, DETROIT STOCK EXCHANGE, MIDWEST STOCK EXCHANGE, INCORPORATED, PACIFIC COAST STOCK EXCHANGE, PBW STOCK EXCHANGE, INC.,

Plaintiffs-Respondents,

against

STATE TAX COMMISSION, NORMAN GALLMAN, MILTON KOERNER, and A. BRUCE MANLEY, as members of the State Tax Commission of the State of New York,

Defendants-Appellants.

812

Appeal by defendants from an order of the Supreme Court at Individual Calendar Part I (George Carney, J.), entered New York County December 20, 1973, denying their motion to dismiss the complaint.

Robert W. Bush of counsel (Ruth Kessler Toch with him on the brief; Louis J. Lefkowitz, Attorney General) for appellant

Roger Pascal of counsel (Milton H. Cohen and Allan Horwich with him on the brief; Schiff Hardin & Waite and Paul, Weiss, Rifkind, Wharton & Garrison, attorneys) for respondents

Samuel J. Warms of counsel (Robert J. Metzler, II, with him on the brief; Adrian P. Burke, Corporation Counsel) for *amicus curiae* City of New York

MACKEN, J.:

By this action, plaintiffs, stock exchanges located in states other than New York, seek a declaration that Section 270-a of the Tax Law, adopted in 1968 and effective July 1, 1969, amending the then existing stock transfer tax law (Tax Law, § 270) is constitutionally invalid, and defendants appeal from an order denying their motion to dismiss the complaint.

Since 1905 this state has imposed a tax "on all sales or agreements to sell, or memoranda of sales and all deliveries or transfers of shares or certificates of stock . . .". Prior to July 1, 1969 all such transactions were taxed at a rate based on the sale price per share of the stock and neither the place where the sale was made nor the residence of the seller had any bearing on the rate of tax. None of the states or cities in which the plaintiffs are located had any such tax and, as found by the Legislature (Laws of 1968, Ch. 827),

> "The securities industry, and particularly the stock exchanges located within the state have contributed importantly to the economy of the state and its recognition as the financial center of the world. The growth of exchanges in other regions of the country and the

> diversion of business to those exchanges of individuals who are nonresidents of the state of New York, requires recognition that the tax on transfers of stock imposed by article twelve of the tax law, is an important contributing element to the diversion of sales to other areas to the detriment of the economy of the state. Furthermore, in the case of transactions involving large blocks of stock, recognition must be given to the ease of completion of such sales outside the state of New York without the payment of any tax. In order to encourage the effecting by nonresidents of the state of New York of their sales within the state of New York and the retention within the state of New York of sales involving large blocks of stock, a separate classification of the tax on sales by nonresidents of the state of New York and a maximum tax for certain large block sales are desirable."

Accordingly, the 1969 amendment provided that in the case of sales made within this state by a nonresident, the rate of tax was reduced by graduated annual steps to fifty percent on July 1, 1973 and thereafter, and further provided for a maximum tax to be imposed in the case of any sales made within the state relating to shares of the same class and issued by the same issuer, the said maximum by annual graduated steps being reduced to $350 on and after July 1, 1973.

As alleged in the complaint "numerous securities which are bought and sold in the United States are delivered in the State of New York or are transferred . . . by banks and by other transfer agents located within the State of New York," including many securities regularly traded on plaintiff exchanges. A large portion of the taxed securities

traded on plaintiff exchanges are also traded on exchanges located in New York and plaintiffs further allege "The legislative purpose and natural effect of the 1969 Amendments has been and will continue increasingly to be the diversion of such transactions from plaintiff exchanges to stock exchanges located within the State of New York and the diversion, in general, of securities business from those engaged in that business outside the State of New York to those engaged in the securities business within the State of New York" and that the Amendment is violative of (1) Clause 3 of Section 8 of Article I (the Commerce clause), (2) Section 2 of Article IV (the Privileges and Immunities clause), and (3) Section 1 of the Fourteenth Amendment (the Equal Protection clause) of the United States Constitution.

Before answering, defendants moved to dismiss on grounds (1) that the court lacks jurisdiction of the subject matter of the action; (2) that plaintiffs do not have legal capacity to sue since they are not subject to the transfer tax and are not legally aggrieved by its provisions; and (3) that the complaint fails to state a cause of action.

We agree with Special Term that our courts have jurisdiction to decide cases involving rights of litigants under the Federal Constitution unless deprived of that power by the Federal Constitution or Statute (1 Carmody Wait 2d, Courts and Their Jurisdiction, Sec. 2:92) and that plaintiffs have legal standing to maintain the action since the stated legislative findings (L. 1968, ch. 827) and the Governor's memorandum of approval (McKinney's Session Laws 1968, Vol. 2, p. 2384) make it clear that indeed a purpose of the 1969 amendment was to discourage diversion of stock transactions from New York exchanges and to encourage transactions of securities in New York. Plaintiffs

may therefore claim to be potentially injured by the amendment (*Association of Data Processing Organization, Inc. v. Camp*, 397 U.S. 150, 152-154).

We fail to find, however, any constitutional infirmity in the statute here attacked.

In adopting the statute, the basic underlying motivation of the Legislature was not to favor New York stock exchanges over out of state exchanges but to fulfill its duty to enact legislation providing vehicles of taxation sufficient to permit the state and its subdivisions to raise the funds required to meet the ever increasing needs of the people of the state for governmental aid and services. The statewide proceeds of the stock transfer tax are appropriated to the City of New York for the support of its local government (State Finance Law, § 92-b), and it appears from the record that such income for the 1968 city fiscal year was estimat at two hundred twenty-nine million dollars. As may well be inferred from the record, the diversion of business from the New York Stock Exchange to out of state exchanges located in cities and states having no transfer tax had caused the New York exchange to consider leaving the state, and it is apparent that such a move would render New York City and the State a severe financial blow including, in addition to the transfer tax revenue, the loss of thousands of jobs, hundreds of millions in payrolls and many millions in real estate and business taxes. In such event the already tax-burdened state would be obliged to come to the aid of the city.

That the taxing power may be used to promote the economy of the taxing unit by favoring nonresidents over residents is clear. *Allied Stores of Ohio v. Bowers* (358 U.S. 522) involved an Ohio statute exempting from *ad valorem*

taxation "merchandise or agricultural products belonging to a nonresident if held in a storage warehouse for storage only". In upholding the statute against a claim that it violated the equal protection provision of the Fourteenth Amendment the court said (pp. 528, 529):

> "But it is obvious that it may reasonably have been the purpose and policy of the State Legislature, in adopting the proviso, to encourage the construction or leasing and operation of warehouses in Ohio by nonresidents with the attendant benefits to the State's economy, or to stimulate the market for merchandise and agricultural products produced in Ohio by enabling nonresidents to purchase and hold them in the State for storage only, free from taxes, in anticipation of future needs . . ."

In *Spatt v. City of New York,* 13 N.Y.2d 618, appeal dismissed for want of substantial federal question, 375 U.S. 394, a compensating use tax on the sale of an automobile outside of the city to a resident of the city computed upon the total selling price of an automobile without deduction of any trade-in allowance as contrasted with the sales tax on a car purchased by a resident within the city computed on the net receipts of the sale after deducting a trade-in allowance, was held constitutional not only "by reason of the greater cost of enforcing the compensating use tax" but also "the greater likelihood of resale of the used car within the City of New York". While in *Spatt* the purchase was made within the state the use tax applies also to those made outside of the state. *(Matter of Atlantic Gulf and Pacific Co. v. Gerosa,* 16 N.Y.2d 1.) It is to be noted that in the latter case a contention that the tax is an unconstitutional burden on interstate commerce was rejected.

In *Madden v. Kentucky,* 309 U.S. 83, an *ad valorem* tax on citizens of Kentucky on deposits in banks outside of the state at a rate five times that on deposits in banks located in the state was upheld. Although deposits in out of state banks by residents of Kentucky would obviously be thereby discouraged, it was found that the ease of collection warranted the distinction, the court saying (p. 93):

> "In the states, there reposes the sovereignty to manage their own affairs except only as the requirements of the Constitution otherwise provide. Within these constitutional limits the power of the state over taxation is plenary. An interpretation of the privileges and immunities clause which restricts the power of the states to manage their own fiscal affairs is a matter of gravest concern to them. It is only the emphatic requirements of the Constitution which properly may lead the federal courts to such a conclusion."

Transactions made in New York are less susceptible to tax evasion than those made outside as evidenced by the legislative finding that "recognition must be given to the ease of completion of such sales outside the State of New York without the payment of any tax". New York may and has provided criminal sanctions on members of exchanges and security dealers for failure to comply with the transfer tax statutes, a remedy not available against non-resident exchanges and dealers. (Tax Law, §§ 270-a, 272.)

As was said in *Wisconsin v. J. C. Penney Co.,* 311 U.S. 435, 445,

> "At best, the responsibility of devising just and productive sources of revenue challenges the wit of legislators. Nothing can be less helpful than for courts to go beyond the extremely limited restrictions that the

> Constitution places upon the states and to inject themselves in a merely negative way into the delicate processes of fiscal policy-making. We must be on guard against imprisoning the taxing power of the states within formulas that are not compelled by the Constitution but merely represent judicial generalizations exceeding the concrete circumstances which they profess to summarize."

See also *Shapiro v. City of New York*, 32 N.Y.2d 96, and *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356.

The order appealed from should be modified on the law and defendants' motion to dismiss the complaint granted to the extent of directing that a judgment be entered declaring that the provisions added to the Tax Law by Chapter 827 of the Laws of 1968 are valid and constitutional, with costs and disbursements to appellants.

All Concur.

Appendix C

Order Appealed From

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on July 9, 1974

Present—Hon. Emilio Nunez, Justice Presiding,
Theodore R. Kupferman,
Aron Steuer,
Louis J. Capozzoli,
Daniel E. Macken, Justices.

BOSTON STOCK EXCHANGE, CINCINNATI STOCK EXCHANGE, DETROIT STOCK EXCHANGE, MIDWEST STOCK EXCHANGE, INCORPORATED, PACIFIC COAST STOCK EXCHANGE, PBW STOCK EXCHANGE, INC.,

Plaintiffs-Respondents,

against

STATE TAX COMMISSION, NORMAN GALLMAN, MILTON KOERNER, and A. BRUCE MANLEY, as members of the State Tax Commission of the State of New York,

Defendants-Appellants.

812

An appeal having been taken to this Court by the defendants-appellants from the order of the Supreme Court, New York County (Carney, J.), entered on December 20, 1973, which, inter alia, denied defendants' motion to dismiss the complaint, and said appeal having been argued by Mr. Robert W. Bush of counsel for appellants, by Mr. Roger Pascal of counsel for respondents, and a brief as amicus curiae having been submitted by Mr. Samuel J. Warms of counsel for The City of New York, and due deliberation having been had thereon, and upon the Opinion of this Court filed herein,

Order Appealed From

It is unanimously ordered that the order so appealed from be and the same is hereby modified, on the law, and defendants' motion to dismiss the complaint granted to the extent of directing that a judgment be entered declaring that the provisions added to the Tax Law by Chapter 827 of the Laws of 1968 are valid and constitutional. Appellants shall recover of respondents $60 costs and disbursements of this appeal.

ENTER:

/s/ Hyman Gamso
Clerk.

Appendix D

Judgment Appealed From

The appeal in this action from the order of the Supreme Court, New York County (CARNEY, J.), entered on December 20, 1973, which, inter alia, denied defendants' motion to dismiss the complaint, having come on to be heard during the June, 1974 Term of the Appellate Division, First Department, and the Court after due deliberation having rendered its unanimous decision (opinion by MACKEN, J.) on the 9th day of July, 1974, and an order dated July 9, 1974 having been duly signed and entered thereon on said date in which it was unanimously ordered that the order so appealed from be and the same is hereby modified, on the law, and defendants' motion to dismiss the complaint granted to the extent of directing that a judgment be entered declaring that the provisions added to the Tax Law by Chapter 827 of the Laws of 1968 are valid and constitutional. Appellants shall recover of respondents $60 costs and disbursements of this appeal, it is hereby

ADJUDGED that the complaint is dismissed and it is further,

ADJUDGED, AND Declared that the provisions added to the Tax Law by Chapter 827 of the Laws of 1968 are valid and constitutional, and it is further

ADJUDGED that the defendants shall recover the costs and disbursements in the sum of $434.90 incurred in the said appeal, and have execution therefor.

/s/ Norman Goodman
Clerk

Dated: New York, New York
August 22, 1974.

(FILED Aug. 22, 1974, New York Co. Clerk's Office)

Judgment Appealed From

The addresses of the plaintiffs-respondents are as follows:

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Boston, Mass. 02109

Cincinnati Stock Exchange
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Cincinnati, Ohio 45202

Detroit Stock Exchange
2314 Penobscot Bldg.
Detroit, Michigan 48226

Pacific Coast Stock Exchange
301 Pine Street
San Francisco, Cal. 94104

PBW Stock Exchange, Inc.
17th & Sanson St.
Philadelphia, Pa. 19103

Midwest Stock Exchange
120 So. LaSalle St.
Chicago, Ill. 60603

Appendix E

Memorandum Decision of the Special Term.

SUPREME COURT—New York County

Individual Calendar—Part I

BOSTON STOCK EXCHANGE, CINCINNATI STOCK EXCHANGE, DETROIT STOCK EXCHANGE, MIDWEST STOCK EXCHANGE, INCORPORATED, PACIFIC COAST STOCK EXCHANGE, PBW STOCK EXCHANGE, INC.,

Plaintiffs,

against

STATE TAX COMMISSION, NORMAN GALLMAN, MILTON KOERNER, and A. BRUCE MANLEY, as members of the State Tax Commission of the State of New York,

Defendants.

Index No. 19417/72

GEORGE CARNEY, *J.*

This is a motion by defendants State Tax Commission *et. al.* to dismiss the complaint upon the grounds that (1) the Court has no jurisdiction of the subject matter of the cause of action; (2) the plaintiffs have no legal capacity to sue since they are not subject to the stock transfer tax imposed by Article 12 of the Tax Law of New York and are not legally aggrieved by such provisions and have no legal right to question the constitutionality of its provisions; (3) the pleadings fail to state a cause of action against the defendants. Defendants also move for an order compelling plaintiffs to post annual surety bonds pending final determination of this action.

Plaintiffs herein are Stock Exchanges which maintain trading facilities and principal places of business outside of the State of New York and which are used to effect purchases and sales of securities outside of the State of New York. They are suing for a declaratory judgment in accordance with CPLR 3001 that Chapter 827, Section 4 of New York Laws 1968 be declared unconstitutional as violative of (1) clause 3 of Section 8 of Article 1 of the Constitution of the United States (the "Commerce Clause") vesting in the Congress of the United States the exclusive power to regulate commerce among the several states (2) Section 2 of Article 4 of the Constitution of the United States (the "privileges and immunities clause") and (3) Section 1 of the 14th Amendment to the Constitution of the United States (the "equal protection clause") and for an injunction and other relief.

Chapter 827, Section 4 of New York Laws, 1968 which became effective July 1, 1969 amended the New York Tax Law, Section 270, New York Laws 1909, Chapter 62, (the "Stock Transfer Tax") by adding Section 270-a thereto. This amendment set forth a schedule of rates of taxation which appreciably lowered the tax rate on the sale of securities by non-residents within the State of New York. It is not disputed that the reason for the amendment was to improve the competitive position of stock exchanges located within the State and encourage non-residents to make transactions within the State.

Sales of securities by non-residents made outside the State of New York and which are subject to the Stock Transfer Tax (by reason of delivery in New York, or transferral in non-exempt transactions by issuers, banks, or other transfer agents in N. Y. etc.) continue to be taxed at the higher rates

which obtain for New York residents. Thus an impetus is provided for non-residents who transfer securities which would be subject to the Stock Transfer Tax to effect the sale of such securities within the State of New York and qualify for the lower rates.

The plaintiff Exchanges allege that a substantial portion of the business transacted by their member firms etc. are in securities which are taxable under the Stock Transfer Tax by New York and that the effect of the Amendment is to divert such transactions effected on plaintiff Exchanges to exchanges located in New York.

From these facts, set forth above, which are alleged in the complaint, and which, for the purposes of this motion, must be accepted as true, it is clear that the complaint states a cause of action. This determination is made on the pleadings alone and whether or not the plaintiffs will be able to establish the allegations is not a pertinent consideration upon this motion. Their complaint alleges damages caused by a statute which they alleged violates the Federal Constitution, and since the plaintiffs also have standing to bring this action, the complaint is a viable one.

In *Association of Data Processing Service Org. Inc. v. Camp.*, 397 U.S. 150, the Supreme Court laid down the test for determination of standing. "The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise." (*Id.* at 152) and the second question is "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question," (*Id.* at 153). Plaintiffs have alleged substantial economic loss and raise the question of whether their economic loss is not caused by State

infringement upon Constitutional guarantees. Plaintiffs need not be payers of the tax themselves in order to have proper standing in this action. "No longer does controlling law require that a plaintiff be directly regulated or taxed by a statute in order to challenge its constitutionality. Rather, as urged by plaintiffs herein, under applicable law, a 'proper' plaintiff must only be 'substantially affected' by the statute in question so that he has sufficient interest in the outcome of the litigation to provide that degree of adversity which will create a justicable controversy between the parties. [citing cases]" (*Society of Plastics v. City of N. Y.*, 68 Misc.2d 366 at 369).

St. Clair v. Yonkers Raceway, 13 N.Y.2d 72, cited by defendants involved an injury to the plaintiff which was clearly remote and incidental to the tax in question, unlike the instant case and the Court of Appeals in that case said "We have always held that the Constitutionality of a State Statute may be tested only *by one personally aggrieved therein,* and then only if the determination of the grievance requires a determination of constitutionality." (*Id.* at 76, emphasis added).

The Court of Appeals in a later case has cited *Data Processing Service v. Camp, supra,* approvingly and held that a claim of economic injury, caused by the business practices of a competitor in violation of a statute is sufficient to confer standing.

The court thus applied the test from Data Processing as set forth hereinabove to decide standing. (*Columbia Gas v. N. Y. Elec. & Gas,* 28 N.Y.2d 117 at 123).

As to that branch of the motion to dismiss on the grounds the court lacks jurisdiction over the subject matter; it is

clear that State Courts of general jurisdiction have the power to decide cases involving rights of litigants under the Federal Constitution unless deprived of that right by the Federal Constitution or statute. (1 Carmody-Wait 2d, *Courts and Their Jurisdiction,* Sect. 2:92, at 113; *Defiance Water Co. v. Defiance,* 191 U.S. 184; *Missouri ex rel. St. Louis B. & M. R. Co. v. Taylor,* 266 U.S. 200).

Accordingly, the motion by defendants to dismiss the complaint is denied in its entirety. Finally, defendants' motion that plaintiffs post a surety bond or bonds to protect the public revenue is denied with leave to defendants to renew at a proper time.

Dated: 12/19/1973

G. M. C.,
J. S. C.

Appendix F

Statute Involved

Laws of 1968, chapter 827

(Tax Law, Article 12, § 270-a)

"Section 1. Legislative findings. The legislature hereby finds that: the securities industry, and particularly the stock exchanges located within the state have contributed importantly to the economy of the state and its recognition as the financial center of the world. The growth of exchanges in other regions of the country and the diversion of business to those exchanges of individuals who are nonresidents of the state of New York, requires recognition that the tax on transfers of stock imposed by article twelve of the tax law, is an important contributing element to the diversion of sales to other areas to the detriment of the economy of the state. Furthermore, in the case of transactions involving large blocks of stock, recognition must be given to the ease of completion of such sales outside the state of New York without the payment of any tax. In order to encourage the effecting by nonresidents of the state of New York of their sales within the state of New York and the retention within the state of New York of sales involving large blocks of stock, a separate classification of the tax on sales by nonresidents of the state of New York and a maximum tax for certain large block sales are desirable.

• • •

"§ 3. Subdivision two of section two hundred seventy of such law, as last amended by section two of chapter seven hundred seventy-one of the laws of nineteen hundred sixty-six, is hereby amended to read as follows:

"2. Except as otherwise provided by section two hundred seventy-a of this chapter, the tax imposed by this section shall be two and one-half cents for each share, except in cases where the shares or certificates are sold, in which cases the tax shall be at the rate of one and one-quarter cents for each share where the selling price is less than five dollars per share; two and one-half cents for each share where the selling price is five dollars or more per share and less than ten dollars per share; three and three-quarters cents for each share where the selling price is ten dollars or more per share and less than twenty dollars per share and five cents for each share where the selling price is twenty dollars or more per share.

"§ 4. Such law is hereby amended by adding thereto a new section to be section two hundred seventy-a, to follow section two hundred seventy and to read as follows:

"§ 270-a. Rates for nonresidents; maximum amounts of tax; penalties. 1. Notwithstanding the provisions of section two hundred seventy of this chapter on and after July first, nineteen hundred sixty-nine, the rates of tax set forth in paragraph (a) of this subdivision and the maximum amounts of tax set forth in subdivision two of this section shall apply, in the case of those sales made within this state subject to tax under section two hundred seventy and described in paragraph (a) of this subdivision and subdivision two of this section.

"(a) On such sales by a nonresident during the periods set forth in the following table, the rates of the

tax shall be the percentages, set forth in such table, of the rates of tax provided in section two hundred seventy of this article:

Period	Percentage of Rates of Tax Provided in Section two hundred seventy of this article
July 1, 1969 to June 30, 1970	95%
July 1, 1970 to June 30, 1971	90%
July 1, 1971 to June 30, 1972	80%
July 1, 1972 to June 30, 1973	65%
July 1, 1973 and thereafter	50%

The tax so calculated shall not be carried out in its computation beyond four decimal points, that is, it shall be computed to the nearest one one-hundredth of one cent.

"(b) For the purposes of this section the following terms shall have the following meanings:

"A 'nonresident' shall mean an individual or a group of individuals jointly owning securities (but including partnerships only if organized and operating solely for the purpose of investing in securities) selling or trading on his or their own account, who is not, or no one of whom is, a resident.

"A 'resident' means an individual who on the day upon which the tax imposed by section two hundred seventy of this chapter accrues,

"(1) regardless of where he resides or is domiciled, (i) is a member of a securities exchange within this state which is registered with the securities and ex-

change commission of the United States; (ii) is a dealer in securities required to be registered with the attorney general of the state of New York; (iii) acts as a dealer in securities or as a broker or agent in transactions concerned with the sale and purchase of securities; or (iv) is a member of or a person employed in a managerial capacity by a firm, company, association or organization, or an officer or director of a person employed in a managerial capacity by a corporation, which is a member organization of a securities exchange, a dealer in securities, or a dealer, broker or agent, described in clauses (i), (ii) or (iii) of this subparagraph, or

"(2) is domiciled in this state, unless on such day he maintained no permanent place of abode in this state, maintained a permanent place of abode elsewhere and during the one year period ending on such day spent in the aggregate, not more than thirty days of such period in this state, or

"(3) is not domiciled in this state, but on such day maintained in this state, a permanent place of abode unless such abode is due solely to such individual's being in the armed forces of the United States, or

"(4) regardless of where he resides, maintains a permanent place of business within this state or is employed within this state.

"(c) No transaction shall be deemed to be by a nonresident and subject to tax at the rates prescribed in this section unless (1) the papers or documents upon or to which are required to be placed or affixed the stamps required by subdivision four of section two hundred seventy of this chapter, to denote the payment of the

tax imposed by such section, have also affixed thereto or placed thereon a declaration in form prescribed by the tax commission signed by the person making the sale or transfer, setting forth facts to show that the transaction is one coming within the provisions of this section; or (2) in the case of transactions executed or effected within this state by any member or member organization of any securities exchange within this state which is registered with the securities and exchange commission of the United States (hereinafter in this section referred to as 'member of a securities exchange') or by any person, firm, corporation, company or association required to be registered with the attorney general of the state of New York as a dealer in securities other than upon any such exchange (hereinafter in this section referred to as 'registered dealer'), who is permitted or required pursuant to any rules and regulations promulgated by the tax commission pursuant to the provisions of section two hundred eighty-one-a of this chapter, to pay the tax imposed by this article without the use of the stamps prescribed by this article, the sale is certified, in such form as the tax commission may prescribe, in the report required to be made to such exchange, or its affiliated clearing corporation or any authorized agency by rules and regulations promulgated by the tax commission pursuant to section two hundred eighty-one-a of this chapter, as being a transaction coming within the provisions of this section. The certification in such report may be made by such member of a securities exchange or registered dealer if he either (i) has obtained from such nonresident a declaration in form prescribed by the tax commission,

or (ii) has met requirements set forth in rules and regulations promulgated by the tax commission, establishing that the sale is one coming within the provisions of this section and (iii) has not on or after the date of obtaining such declaration or its delivery and filing, received from such nonresident either a notice of cancellation, in form prescribed by the tax commission, as described in subparagraph three of paragraph (b) of subdivision three of this section, and has no knowledge or reasonable grounds to believe that the status of such nonresident as a nonresident has changed.

"2. Where any sale made within the state and subject to the tax imposed by this chapter relates to shares or certificates of the same class and issued by the same issuer the amount of tax upon any such single taxable sale *shall not exceed,* during the period beginning on July first, nineteen hundred sixty-nine and ending on June thirtieth, nineteen hundred seventy, the sum of two thousand five hundred dollars; during the period beginning on July first, nineteen hundred seventy and ending on June thirtieth, nineteen hundred seventy-one, the sum of one thousand two hundred fifty dollars; during the period beginning on July first, nineteen hundred seventy-one and ending on June thirtieth, nineteen hundred seventy-two, the sum of seven hundred fifty dollars; during the period beginning on July first, nineteen hundred seventy-two and ending on June thirtieth, nineteen hundred seventy-three, the sum of five hundred dollars; and on and after July first, nineteen hundred seventy-three, the sum of three hundred fifty dollars; provided, however, that sales made with-

in this state by any member of a securities exchange or by any registered dealer, who is permitted or required pursuant to any rules and regulations promulgated by the tax commission pursuant to the provisions of section two hundred eighty-one-a of this chapter to pay the taxes imposed by this article without the use of the stamps prescribed by this article, pursuant to one or more orders placed with the same member of a securities exchange or the same registered dealer on one day, by the same person, each relating to shares or certificates of the same class and issued by the same issuer, all of which sales are executed on the same day (regardless of whether it be the day of the placing of the orders), shall, for the purposes of this subdivision two, be considered to constitute a single taxable sale.

"3. (a) Any person who shall knowingly make any false statement in a declaration provided for by paragraph (c) of subdivision one of this section, shall be guilty of a misdemeanor and upon conviction thereof shall be liable to a fine of not less than five hundred nor more than one thousand dollars, or be imprisoned for not more than one year, or be subject to both such fine and imprisonment, in the discretion of the court.

"(b) Any person who—

"(1) having executed, filed with and delivered to a member of a securities exchange or a registered dealer a declaration provided for by paragraph (c) of subdivision one of this section;

"(2) thereafter ceases knowingly to be a nonresident;

"(3) fails to execute, file and deliver a notice of cancellation of such declaration, with and to such member or dealer; and

"(4) after ceasing to be such a nonresident and prior to the execution, filing and delivery of such notice of cancellation, with intent to evade or defeat the collection of any tax imposed by this article, places and allows to be executed an order with such member or dealer for the sale of any shares or certificates described in section two hundred seventy of this chapter; shall be guilty of a misdemeanor and upon conviction thereof shall be liable to a fine of not less than five hundred nor more than one thousand dollars, or be imprisoned for not more than one year, or be subject to both such fine and imprisonment, in the discretion of the court."

Appendix G

Legislative Developments That May Affect the Application of Section 270-a of the New York Transfer Tax in Certain Circumstances

On December 1, 1975, after decision by the State of New York Court of Appeals in this case, Section 21(2)(d) of the Securities Acts Amendments of 1975, Pub.L.No. 94-29 (June 4, 1975), became effective. Section 28(d) of the Securities Exchange Act of 1934, 15 U.S.C. § 78bb(d), as amended thereby, now reads:

> No State or political subdivision thereof shall impose any tax on any change in beneficial or record ownership of securities effected through the facilities of a registered clearing agency or registered transfer agent or any nominee thereof or custodian therefor or upon the delivery or transfer of securities to or through or receipt from such agency or agent or any nominee therefor or custodian therefor, unless such change in beneficial or record ownership or such transfer or delivery or receipt would otherwise be taxable by such State or political subdivision if the facilities of such registered clearing agency, registered transfer agent, or any nominee thereof or custodian therefor were not physically located in the taxing State or political subdivision. No State or political subdivision thereof shall impose any tax on securities which are deposited in or retained by a registered clearing agency, registered transfer agent, or any nominee thereof or custodian therefor, unless such securities would otherwise be taxable by such State or political subdivision if the facilities of such registered clearing agency, registered transfer agent, or any nominee thereof or custodian therefor were not physically located in the taxing State or political subdivision.

The State of New York Department of Taxation and Finance has recognized this law as prohibiting collection

of taxes imposed under the New York Transfer Tax where the "sole event in New York State is the delivery or transfer to or by a 'registered clearing agency' or a 'registered transfer agent'. . . ." *Release of the State of New York Department of Taxation and Finance,* December 1, 1975.

If this situation continues, one application of section 270-a which is challenged in this case would be rendered void: *viz.,* the discriminatory taxation of securities transfers preceded by an out-of-state sale when transfer is effected by a "registered transfer agent."[1] The New York

[1] For purposes of the Securities Exchange Act of 1934, a transfer agent is

> . . . any person who engages on behalf of an issuer of securities or on behalf of itself as an issuer of securities in (A) countersigning such securities upon issuance; (B) monitoring the issuance of such securities with a view to preventing unauthorized issuance, a function commonly performed by a person called a registrar; (C) registering the transfer of such securities; (D) exchanging or converting such securities; or (E) transferring record ownership of securities by bookkeeping entry without physical issuance of securities certificates. The term "transfer agent" does not include any insurance company or separate account which performs such functions solely with respect to variable annuity contracts or variable life policies which it issues or any registered clearing agency which performs such functions solely with respect to options contracts which it issues. Securities Exchange Act of 1934, § 3(a)(25), 15 U.S.C. § 78c(25).

Unless exempted by the appropriate regulatory agency, it is

> . . . unlawful for any transfer agent, unless registered in accordance with this section, directly or indirectly, to make use of the mails or any means or instrumentality of interstate commerce to perform the function of a transfer agent with respect to any security registered under section 12 of this title or which would be required to be registered except for the exemption from registration provided by subsections 12(g)(2)(B) or 12(g)(2)(G) of that section. Securities Exchange Act of 1934, § 17A(c)(1), 15 U.S.C. § 78q-1(c)(1).

tax in that situation would remain uncollectable by Congressional mandate.

Plaintiffs suggest, however, that in the near future federal law may be changed to permit New York to reinstate its taxation of transfers effected by registered transfer agents. At the signing of Pub.L.No. 94-29, President Ford stated:

> . . . I understand that the legislation contains an inadvertent technical error concerning the presence of a transfer agent as a jurisdictional basis for state or local taxation of securities transactions. I also understand that legislation to correct this error retroactively is being prepared, and that such legislation will receive prompt consideration in Congress. When such corrective legislation is presented to me, I intend to sign it.[2]

Following the enactment of Pub.L.No. 94-29, bills were considered in both Houses of Congress to "correct" the "inadvertent" impact of Pub.L.No. 94-29 on the New York Tax Law. S.2136, 94th Cong., 1st Sess. (1975); S.2615, 94th Cong., 1st Sess. § 12 (1975); H.R.9852, 94th Cong., 1st Sess. § 10 (1975). S.2136 and similar bills are expected to receive renewed consideration when the 94th Congress reconvenes in January, 1976, and may, in fact, become law before the Court's normal calendar will allow consideration of the Jurisdictional Statement filed by plaintiffs in this case.

Regardless of the final Congressional action with respect to the power of the states to tax transfers effected by registered transfer agents, the discriminatory impact of section 270-a in its other applications continues. For example, if a New York resident sells a block of securities to another New York resident and the latter receives delivery

[2] Office of the White House Press Secretary, News Release (June 5, 1975).

in New York, the tax due is heavier if the preceding sale occurred outside the state than if it occurred in-state—and Pub.L.No. 94-29 in no way changes this result. Similarly, if a non-resident sells to a New York resident who receives delivery of the securities in New York, the "non-resident discount" will continue to be available only if the sale occurs in-state. Further, if an in-state transfer of securities is effected by a person other than a registered transfer agent,[3] the place of sale retains all of its discriminatory consequences.

[3] The appropriate regulatory agency has the power to exempt transfer agents from registration if such exemption is in the public interest. 15 U.S.C. § 78q-1(c)(1).

Appendix H

Notice of Appeal

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

BOSTON STOCK EXCHANGE, CINCINNATI STOCK EXCHANGE, DETROIT STOCK EXCHANGE, MIDWEST STOCK EXCHANGE, INCORPORATED, PACIFIC COAST STOCK EXCHANGE, PBW STOCK EXCHANGE, INC.,

Plaintiffs-Appellants,

v.

STATE TAX COMMISSION, NORMAN GALLMAN, MILTON KOERNER, and A. BRUCE MANLEY, as members of the State Tax Commission of the State of New York,

Defendants-Respondents.

New York County Clerk's Index No. 19417/72

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Boston Stock Exchange, Cincinnati Stock Exchange, Detroit Stock Exchange, Midwest Stock Exchange, Incorporated, Pacific Coast Stock Exchange, PBW Stock Exchange, Inc., the appellants above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the State of New York Court of Appeals, No. 368, entered in this action on October 21, 1975, affirming the order of the Appellate Division of the Supreme Court, First Department, entered in the office of the Clerk of said Appellate Division on July 9, 1974, which substantially modified the order of the Supreme Court, New York County, entered in the office

of the Clerk of New York County on December 20, 1973, by granting defendants-respondents' motion to dismiss the complaint to the extent of directing that a judgment be entered declaring that the provisions added to the New York Tax Law by Chapter 827 of the Laws of 1968 are valid and constitutional.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).
DATED: December 5, 1975

SCHIFF HARDIN & WAITE

By .....
ROGER PASCAL

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Chicago, Illinois 60606

Attorneys for Plaintiffs-Appellants

TO:

Louis J. Lefkowitz
Attorney General of the
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Corporation Counsel
The City of New York
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New York, New York 10007

Clerk of New York County
60 Centre Street
New York, New York 10007

AFFIDAVIT OF SERVICE BY MAIL

Roger Pascal, being duly sworn, deposes and says:

1. Deponent is not a party to the action, is over 18 years of age, and resides at 1025 Forest, Evanston, Illinois.

2. That on the 5th day of December, 1975, deponent served the within Notice of Appeal upon:

Louis J. Lefkowitz
Attorney General of the
State of New York
The Capitol
Albany, New York 12224

Adrian Burke
Corporation Counsel
The City of New York
Municipal Building
New York, New York 10007

at the foregoing addresses, the addresses designated by the attorneys for that purpose, by causing true copies of same to be mailed to them, first class postage prepaid.

ROGER PASCAL

Sworn to before me this
5th day of December, 1975

THERESE GLATZHOFER
Notary Public